No. 80-458

Supreme Court, U. S.
FILED
NOV 3 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CITY OF SOUTH LAKE TAHOE, ROGER CAPRI, AS MAYOR OF THE CITY OF SOUTH LAKE TAHOE; JOHN WYNN, ROBERT KAUFMAN, WILLIAM MOYER AND PATRICIA LOWE, AS CITY COUNCILMEMBERS OF THE CITY OF SOUTH LAKE TAHOE,

Petitioners,

v.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, AND GORDON HOOPER, GERALD M. POZNANOVICH, JAN CHATTEN-BROWN AND KENNETH L. WOODWARD, INDIVIDUALLY AND AS MEMBERS OF THE GOVERNING BODY OF THE CALIFORNIA TAHOE REGIONAL PLANNING AGENCY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHERE THE UNDERLYING ISSUES INVOLVE THE APPLICATION OF A COMPLEX, SPECIALIZED SYSTEM OF LAND USE PLANNING, AND PARALLEL LITIGATION BETWEEN THE PARTIES IS PENDING IN STATE COURT, IS APPLICATION OF THE FEDERAL DOCTRINE OF ABSTENTION AND THE RELATED RULE REQUIRING AVOIDANCE OF DUPLICATIVE LITIGATION WARRANTED?

II. DO A CITY AND MEMBERS OF ITS CITY COUNCIL HAVE STANDING IN FEDERAL COURT TO CHALLENGE REGULATIONS IMPOSED UNDER ADMITTEDLY VALID STATE STATUTES DESIGNED TO PROTECT THE ENVIRONMENT AND AMENITIES OF THE LAKE TAHOE BASIN?

III. SHOULD THIS COURT GRANT DISCRETIONARY REVIEW OF A CASE WHEN CONGRESS IS CONSIDERING APPROVAL OF AN INTERSTATE COMPACT LIKELY TO MAKE THE CASE MOOT?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents California Tahoe Regional Planning Agency, Gordon Hooper, Gerald M. Poznanovich, Jan

Chatten-Brown and Kenneth L. Woodward [1] (referred to collectively as "CTRPA") hereby submit their joint brief in opposition to the petition for writ of certiorari, which seeks review of the decision of the United States Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The 1980 opinion of the United States Ninth Circuit Court of Appeals is reported at 625 F.2d 231. The unreported opinion of the United States District Court for the Eastern District of California is reproduced as appendix B to the petition for writ of certiorari.

JURISDICTION

Petitioners (hereinafter referred to collectively as "the City") seek to invoke this Court's jurisdiction under 28 United States Code section 1254(1). For the reasons set forth in part II of the argument, *infra,* this Court lacks jurisdiction to consider the questions raised in the petition.

STATEMENT OF THE CASE

A. CREATION AND NATURE OF RESPONDENT CTRPA.

Respondent CTRPA is a political subdivision of the State of California. It was created by the California Legislature as a regional land use planning agency to address the difficult land use and ecological problems

[1] Since the commencement of this litigation, respondents Hooper and Woodward have resigned their positions as members of the CTRPA governing body.

existing in the California portion of the Lake Tahoe basin. A brief summary of the origins and responsibilities of CTRPA is essential to a full understanding of the issues raised in this petition.

In 1967, the California Legislature passed a proposed interstate compact with the State of Nevada that would have created a strong bi-state Tahoe Regional Planning Agency ("TRPA") with broad powers to protect the environment of the entire Lake Tahoe basin. The same California legislation contained a provision for creation of a CTRPA at the state level which was to be active only until the TRPA began functioning.

Nevada, however, refused to accept the California proposal and enacted its own version of a compact, one greatly lessening the ability and will of the TRPA to provide effective environmental protection. Among other things, the Nevada version increased local government representation to a majority of each state's TRPA delegation, removed much of TRPA's potential jurisdiction, and excluded certain major public works projects from TRPA review.

In 1968, California accepted Nevada's weakening amendments, and the Tahoe Regional Planning Compact ("the Compact") was ratified by Congress soon thereafter. Act of Dec. 18, 1969, Pub. L. No. 91-148, 83 Stat. 360 (1969); see also *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U.S. 391 (1979). (As discussed in detail *infra,* both California and Nevada enacted major revisions to the Compact earlier this year.) In the same legislation, however, California made

the CTRPA a permanent agency and secured language in the Compact resolving that the bi-state TRPA,

> ". . . shall establish a *minimum* standard applicable throughout the basin, and [that] any political subdivision may adopt and enforce an *equal or higher standard* applicable to the same subject of regulation in its territory." Compact art. VI(a); Tahoe Regional Planning Compact of 1969, Pub. L. No. 91-148, 83 Stat. 360 (1969). (Emphasis added.)

In this manner, the California Legislature made it clear that CTRPA would have the power to adopt environmental regulations stricter than those adopted by TRPA.[2]

Until 1973, CTRPA functioned largely as an adjunct of TRPA, but by that point it had become clear that TRPA would not provide the level of environmental stewardship desired by California. See *People of the State of California* ex rel. *Younger* v. *Tahoe Regional Planning Agency,* 516 F.2d 215, 218 (9th Cir. 1975) *cert. den.,* 423 U.S. 868; *Raley* v. *California Tahoe Regional Planning Agency,* 68 Cal.App.3d 965, 971–972, 137 Cal.Rptr. 699, 702–703 (1977). In 1974, CTRPA began separate meetings and commenced independent rulemaking proceedings. The agency adopted a general plan and land use ordinance to guide development on the California side of the Lake Tahoe basin in mid-1975.

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[2] For a general history of the legislation which led to the TRPA and the creation of regional land use planning efforts at Lake Tahoe, see Note, *Regional Government for Lake Tahoe,* 22 Hastings L.J. 705 (1971).

B. CTRPA'S RELATIONSHIP TO THE CITY OF SOUTH LAKE TAHOE.

CTRPA's enabling legislation is set forth in sections 67000 through 67130 of the California Government Code. The agency consists of a seven member governing body, three of whose members represent each of the three local governments in the area (including an appointee of the City Council of the City of South Lake Tahoe), three state representatives, and a seventh member appointed by the other six to serve as chairman. The legislation contemplates a cooperative relationship between CTRPA and affected local governments such as the City. For example, CTRPA is directed by law to seek the assistance of local government in formulating its regional land use plan, and to harmonize that plan with the needs and existing plans of the City to the maximum extent possible. Cal. Gov't Code, § 67071. (West Supp. 1980). In return, the City is required to enforce the provisions of the CTRPA regulatory program. Cal. Gov't. Code, §§ 67072, 67102 (West Supp. 1980).

C. COMMENCEMENT OF THE CURRENT LITIGATION.

On October 17, 1975, the City filed suit against CTRPA and selected members of its governing body in the United States District Court for the Eastern District of California. The complaint, as amended, seeks injunctive and declaratory relief to nullify both the general plan and implementing ordinances adopted by CTRPA. Specifically, the City asserts that the CTRPA regulatory pro-

gram has deprived unspecified persons of their rights to just compensation, due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution; that the CTRPA regulations impair the public's constitutional right to travel; and that these same regulations are somehow in conflict with the Tahoe Regional Planning Compact and TRPA's own implementing regulations, thereby violating the Supremacy Clause of the United States Constitution.

D. DECISIONS BELOW.

In response to the complaint, respondents filed two motions in the district court: the first requested the court to abstain from exercising its jurisdiction, while the second sought dismissal of the complaint on the grounds that the City lacked the requisite standing to bring the litigation. On July 29, 1977, the district court issued its opinion and order invoking the doctrine of abstention to dismiss the case. The court expressly declined to address the issue of standing.

The City appealed the district court's order. On June 25, 1980, the Ninth Circuit Court of Appeals affirmed the decision of the lower court. In so doing, the Court of Appeals did not reach the abstention issue. Instead, the court found that neither the City nor its councilmembers had standing to sue.

The substantive issues contained in this litigation are the subject of several pending actions in the California courts. See discussion at section I(A), *infra.*

SUMMARY OF ARGUMENT

1. Both the doctrine of abstention and the related rule requiring avoidance of duplicative litigation should be invoked in this case. First, abstention is warranted under the *Pullman* doctrine because a determination of pertinent state law by the California courts might well moot or alter the underlying federal constitutional issues presented in this case. Litigation raising various state law issues concerning the scope of CTRPA's land use powers is currently pending between the parties to this action in the California courts. Abstention is also warranted under what has become known as the *Burford* doctrine of abstention. This action, involving a dispute between two political subdivisions of the State of California regarding their respective land use powers, involves a classic example of sensitive policy issues that should be left to the state courts for initial review. Similarly, principles relating to the avoidance of duplicative litigation warrant dismissal of this case.

2. The lower court correctly held that petitioners lack standing to bring this action. In principal part, they seek to pursue claims on behalf of private parties who have a demonstrated ability to secure their own representation. Furthermore, longstanding precedent bars the City from challenging the constitutionality of the land use measures at issue. The claims of individual City officials that they face potential liability due to their enforcement of CTRPA regulations is wholly speculative, and has been rejected by federal courts in the past.

3. Major revisions to the TRPA Compact, recently adopted by California and Nevada and likely to be rati-

fied by Congress in the immediate future, would profoundly affect the claims asserted by the City and render this litigation essentially moot.

REASONS WHY THE WRIT SHOULD BE DENIED

I

THE FEDERAL DOCTRINE OF ABSTENTION AND THE RELATED RULE REQUIRING AVOIDANCE OF DUPLICATIVE LITIGATION COMPEL THE CONCLUSION THAT THE WRIT OF CERTIORARI SHOULD BE DENIED.

The district court correctly held that it should abstain from exercising jurisdiction over this case, basing its decision on independent analyses of several distinct facets of the abstention doctrine. That conclusion is equally compelling here, and warrants the Court's dismissal of the instant petition.

In *Colorado River Water Cons. Dist.* v. *United States,* 424 U.S. 800 (1976), this Court summarized the criteria that are applicable under the different categories of abstention, as well as under the rules governing duplicative litigation. The Court reviewed the various applicable doctrines as follows:

1. Abstention is appropriate in "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Id.* at 814. This is commonly referred to as the *Pullman* doctrine of abstention, after the Court's decision in *Railroad Comm'n* v. *Pullman Co.,* 312 U.S. 496 (1941).

2. Abstention also lies in cases where difficult questions of state law are presented, bearing on policy problems of substantial public import whose significance transcends the result in a specific case before the court. The state law question itself may be determinative of state policy, but it is sufficient if merely the exercise of federal review of a question in a specific case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. This category of abstention cases is generally referred to as the *Burford* doctrine of abstention, after the decision in *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943). Under this category, it does not matter whether the case also presents substantial federal questions. As long as unsettled stated law questions which bear in important state policy problems are involved, the federal court must abstain.

3. Finally, this Court has held that even in cases where the traditional doctrine of abstention does not apply, principles relating to the avoidance of duplicative litigation may nevertheless require dismissal of the federal action in favor of state court adjudication. *Colorado River Water Cons. Dist.* v. *United States, supra,* 424 U.S. at 817–820.

The instant case falls squarely into the above two categories requiring abstention, as well as within the doctrine requiring dismissal on grounds governing duplicative litigation.

A. Abstention Should Be Ordered Because the Adjudication of the State Law Issues Presented in This Case May Avoid or Modify the Federal Constitutional Questions Raised in This Case ("Pullman Abstention")

As indicated, *Pullman* abstention applies to cases where "a federal constitutional issue . . . might be mooted or presented in a different posture by a state court determination of pertinent state law." *County of Alleghany* v. *Frank Mashusa Co.,* 360 U.S. 185, 189 (1959); *Sederquist* v. *City of Tiburon,* 590 F.2d 278 (9th Cir. 1978).

This particular type of abstention has recently been applied consistently by the federal courts in cases involving municipal and regional land use problems. See, *e.g., Sederquist* v. *City of Tiburon, supra,* 590 F.2d 278 (abstention proper in action challenging application of municipal land use ordinance pending conclusion of related state court proceedings); *Rancho Palos Verdes Corp.* v. *City of Laguna Beach,* 547 F.2d 1092 (9th Cir. 1976) (same); *Hill* v. *City of El Paso,* 437 F.2d 352 (5th Cir. 1971) (federal courts should refrain from hearing challenge to city ordinance banning junkyards because state court proceedings more appropriate); *Beck* v. *State of California,* 479 F.Supp. 392 (C.D.Cal. 1979) (abstention invoked to avoid interference with extensive state efforts to implement regional land use controls of coastal development).

Pullman and its progeny establish a three-part standard for applying this type of abstention. First, does the complaint touch "a sensitive area of social policy upon which the federal courts ought not to enter unless no

alternative to its adjudication is open"? Second, can such constitutional adjudication plainly be avoided by a definitive ruling on the state issue that would terminate the controversy? Finally, is the possibly determinative issue of state law doubtful? *Railroad Comm'n* v. *Pullman Co.,* 312 U.S. 496, 498–500 (1941).

Each of these criteria is amply satisfied in the present case. There can be little doubt that land use planning is today a most sensitive area of social policy. *Penn Central Transp. Co.* v. *New York City,* 438 U.S. 104 (1978). Federal courts have in the past been most reluctant to intrude in this area unnecessarily. In *Rancho Palos Verdes Corp.* v. *City of Laguna Beach, supra,* 597 F.2d 1092, the Ninth Circuit clearly articulated the reasons for allowing land use regulations to be reviewed by the state courts in the first instance:

> "The complaint involves land use planning. An array of State constitutional provisions and statutes demonstrate that this is today a sensitive area of social policy . . . one upon which federal courts ought not to enter unless no alternative to its adjudication is open." *Id.* at 1094.

Moreover, federal adjudication of the validity of CTRPA's regulatory program can be avoided through resolution of issues of state law. These include the scope and intent of CTRPA's enabling legislation, the nature of jurisdiction conferred on the City under state law vis-a-vis CTRPA, and the efficacy of the CTRPA regulations under applicable provisions of the California Constitution. In an era of congested federal dockets, the instant case is an example of a controversy more appropriately decided by the state courts in the first instance.

Finally, the various, potentially-determinative issues of state law are as yet unresolved. California courts have not yet had the opportunity to consider the issues set forth above. Notably, however, cases are currently pending in California courts that have the clear potential of resolving these very issues. In *California Tahoe Regional Planning Agency* v. *City of South Lake Tahoe* (Alpine Co. Super. Ct. No. 584), litigation has been initiated between these same parties to establish the extent and nature of the City's obligations to enforce CTRPA regulations.[3] The Court is respectfully requested to take judicial notice of the pendency of these state court actions under rule 201 of the Federal Rules of Evidence.

Thus, all of the requirements found to justify abstention under the *Pullman* doctrine have been met in this case.

B. Abstention Should Be Ordered so as to Avoid Needless Interference With the State's Attempts to Implement and Develop State Policy in Regulating a Difficult and Complex Area of Vital State Concern ("Burford Abstention")

Where a court abstains under *Pullman,* retention of jurisdiction, and not dismissal of the action, is the proper

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[3] Suits are similarly underway between CTRPA and other local jurisdictions with legal relationships to CTRPA identical to those of the City. Besides raising each of the federal constitutional issues contained in the present case, one of these lawsuits present numerous arguments that CTRPA regulatory actions are invalid under the California Constitution and state administrative law. *CTRPA* v. *County of El Dorado* (Alpine Co. Super. Ct. No. 583); *CTRPA* v. *County of Placer* (Alpine Co. Super. Ct. No. 573). Counsel for the parties have stipulated that these actions and the related CTRPA/City litigation in Alpine County be consolidated for trial.

course. *Rancho Palos Verdes Corp.* v. *City of Laguna Beach, supra,* 547 F.2d at 1096. On the other hand, where abstention is appropriate under *Burford* v. *Sun Oil Co., supra,* 319 U.S. 315, the action must be dismissed. While the instant case is plainly one in which *Pullman* abstention is appropriate, respondents believe the case presents even stronger grounds for abstention under *Burford.* Accordingly, the Court is urged to adopt that course in this case.

Stated simply, the *Burford* abstention requires that the federal court abstain in order to avoid needless interference with the state's attempts to implement and develop state policy in regulating a difficult and complex area of vital state concern. *Colorado River Water Cons. Dist.* v. *United States, supra,* 424 U.S. at 814–816.

It is exceedingly difficult to envision a case in which application of the *Burford* doctrine would be more warranted than in the present case. This action involves a dispute between a California local government and a political subdivision of the State of California attempting to carry out a state regulatory program. Creation of CTRPA and its regulatory program was a direct legislative response to a perceived inability of local government to resolve vital public concerns about degradation of the Lake Tahoe environment. The California Legislature enunciated those concerns most forcefully in the

findings accompanying the legislation creating CTRPA.[4]

The intervention of the federal judiciary in this attempt by a California local government to overturn a vital state regulatory program would most grievously impair the concept of comity. It would frustrate the ability of a state, as a sovereign, to assign responsibility and allocate authority among its own agencies and political subdivisions.

In *Younger* v. *Harris,* 401 U.S. 37, 44 (1971), the Court described the concept of comity as:

> ". . . a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate State Governments and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." See also *Alabama Public Service Comm'n* v. *Southern R. Co.,* 341 U.S. 341, 347 (1951).

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[4] Sections 67000–02 of the California Government Code provide that:

"It is found and declared that the waters of Lake Tahoe and other resources of the Lake Tahoe region are threatened with deterioration or degeneration, which may endanger the natural beauty and economic productivity of the region."

"It is further declared that by virtue of the special conditions and circumstances of the natural ecology, developmental pattern, population distribution and human needs in the Lake Tahoe region, the region is experiencing problems of resource use and deficiencies of environmental control."

"It is further found and declared that . . . for the purpose of enhancing the efficiency and governmental effectiveness of the region, it is imperative that there be established an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development, to exercise effective environmental controls and to perform other essential functions, as enumerated in this title."

The Ninth Circuit Court of Appeals recently articulated its respect for the principles of comity as applied to land use issues:

> "California is attempting to grapple with difficult land use problems through new policies and new mechanisms of regulation. . . . *Federal courts must be wary of intervention that will stifle innovative State efforts to find solutions to complex State problems." Rancho Palos Verdes Corp.* v. *City of Laguna Beach, supra,* 547 F.2d at 1095. (Emphasis added.)

The CTRPA regulatory program challenged by the City represents just such an innovative effort to resolve protracted, complex land use problems in a region of inestimable value. Application of abstention under the *Burford* doctrine is required to ensure that this objective is not frustrated.

C. The Rule Regarding Avoidance of Duplicative Litigation Requires Dismissal of This Action in Favor of State Court Adjudication

Even in cases where the traditional doctrine of federal abstention may not apply, principles relating to the avoidance of duplicative litigation may nevertheless require dismissal of the federal action in favor of state court adjudication. These principles rest on "considerations of 'wise judicial administration given regard to conservation of' judicial resources and comprehensive disposition of litigation." *Colorado River Water Cons. Dist.* v. *United States, supra,* 424 U.S. at 817.

In *Colorado River Water Cons. Dist.,* the Court noted that in assessing the appropriateness of federal dismissal

due to the presence of a concurrent state proceeding, a carefully considered judgment taking into acount both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. No one factor is necessarily determinative. The Court listed the following as examples of appropriate factors to be considered:

1. The desirability of avoiding piecemeal litigation;
2. The inconvenience of the federal forum; and
3. The order in which jurisdiction was obtained by the concurrent forums.

As previously indicated, virtually all of the constitutional allegations contained in the City's complaint in this action are raised in the litigation between CTRPA and local government now pending in state court. Conversely, there have as yet been no proceedings in the present case going to the substantive issues raised in the City's complaint.

For these reasons, the rule regarding avoidance of duplicative litigation strongly suggests that dismissal of this action in favor of state court adjudication is warranted.

II

THE CITY AND MEMBERS OF ITS COUNCIL LACK STANDING TO ATTACK THE STATE REGULATIONS IMPOSED ON PROPERTY IN THE LAKE TAHOE BASIN

The United States Court of Appeals for the Ninth Circuit found that the City of South Lake Tahoe and several individual members of its city council lacked the stand-

ing necessary to establish federal court jurisdiction over this case. This determination was entirely correct and in keeping with long-established principles of standing as enunciated by this Court. Furthermore, a denial of the writ requested herein will not result in any substantial harm to petitioners or those whom they purport to represent.

In an important recent case dealing extensively with the standing issue, this Court, after noting that standing involves both constitutional and prudential considerations, observed:

> "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." [Citation omitted.] *Warth* v. *Seldin,* 422 U.S. 490, 498–499 (1975). (Emphasis in original.)

In implementing this rule, two relevant tests have been laid down. First, the federal courts will not normally attempt to resolve "generalized grievances shared by large numbers of citizens." Second, even when the plaintiff has alleged some specific injury to himself, he must also assert the violation of his own rights, not the rights of third parties. *id.* at 499–500.

The instant case provides a nearly casebook example

of a situation where none of the factors normally relied upon to find standing are present.

The basic allegations of the petitioners are that respondents have enacted plans and ordinances which unconstitutionally restrict the use of privately owned land lying within the boundaries of the City of South Lake Tahoe. For example, the complaint alleges that the CTRPA regional plan and land use ordinance prohibit the subdivision of land until a certain percentage of the existing lots within a specified area have been utilized for the construction of at least one dwelling unit or structure. Amended Complaint for Declaratory and Injunctive Relief, p. 6. It is then alleged that this restriction has "taken" a "substantial amount of real property within the California portion of the Lake Tahoe Region, including property within the City of South Lake Tahoe . . . ." *Id.* It is also alleged, in the broadest possible terms, that the CTRPA land use ordinance and regional plan are "wholly arbitrary," and that they deprive "persons subject thereto" of due process of law, equal protection under the law, and the right to travel. *Id.* at 7. However, no injury whatsoever is alleged to any land belonging to the City or any of the named plaintiffs. The complaint asks instead that the federal courts invalidate numerous provisions of the CTRPA regional plan and land use ordinance *in toto* without any consideration of the impact on even one specific parcel of land. As the trial court noted, however, "The CTRPA plans and ordinances do not, on their faces, violate the United States Constitution." Petn. for Writ of Cert., p. 23.

A. Petitioners Are Not Entitled To Raise The Rights of Third Parties

As noted in *Warth* v. *Seldin, supra,* one is not normally entitled to assert constitutional rights and immunities belonging to others. See, e.g., *McGown* v. *Maryland,* 366 U.S. 420, 429–430 (1961); *Tileston* v. *Ullman,* 318 U.S. 44 (1943). Virtually all of the exceptions permitted have involved specially protected rights such as freedom from racial discrimination or freedom of speech, a party involuntarily before the court as a defendant, a party with an exceptionally close relationship to those whose rights are being asserted, or, perhaps most importantly, the impracticability of the assertion of the claimed rights by the third parties. *See, e.g., NAACP v. Alabama* ex rel. *Patterson,* 357 U.S. 449 (1958). See generally Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 Yale L.J. 599 (1962). Usually some combination of these factors is present. Here, none of them point to a finding of standing. First, this case does not involve freedom of religion or speech. Secondly, the parties wishing to assert the rights of others are plaintiffs in this suit. Third, the plaintiffs herein, while "related" to some of the landowners whose rights they purport to assert in the sense that the plaintiffs represent them on the city council, do not have a relationship which has been used to find standing in other cases. See, e.g., *Reuss* v. *Balles,* 584 F.2d 461 (D.C. Cir. 1978). Moreover, many of those purportedly being represented are supporters of the CTRPA plans and ordinances, either because their land is increased in value by the regulations or for

more philosophical reasons. Thus, some of those who are being "represented" would no doubt decline such representation were they given the choice. Finally, if there is one absolute certainty about this case it is that the landowners who oppose CTRPA regulations are entirely capable of securing their own representation; indeed, a number have already done so and have pressed their cases with great vigor.[5] The attempt of the city to also represent these landowners can only result in confusion and possibly inconsistent results.

B. Petitioners' Alleged Injuries Are Wholly Speculative And Do Not Support Invocation Of Federal Court Jurisdiction

Even were the Court to find that the petitioners should have been allowed to base their claims on the rights of third parties, standing still would not exist unless the City or its council members could allege " 'such a personal stake in the outcome or the controversy' as to warrant [their] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [their] behalf." *Warth* v. *Seldin, supra,* 422 U.S. at 498.

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[5] See, e.g., *Dillingham Development Co.* v. *California Tahoe Regional Planning Agency, City of South Lake Tahoe, et al.* (E.D. Cal., No. S-77-285). *Dillingham Development Co.* v. *California Tahoe Regional Planning Agency* (Sacramento Co. Super. Ct. No. 272204) (alleging that CTRPA's temporary ban on new subdivisions has resulted in an unconstitutional taking of its property). (As to the disposition of the complaint against the City of South Lake Tahoe in the state court case, see discussion at section II (B), infra.) See also, *Brockway Development Co.* v. *California Tahoe Regional Planning Agency* (Placer Co. Super. Ct. No. 56841); *Perini* v. *California Tahoe Regional Planning Agency* (E.D. Cal., No. S-77-149); *Perini* v. *California Tahoe Regional Planning Agency* (San Francisco Super. Ct. No. 720-386).

Their interests are, in fact, wholly abstract, and much more ideological then practical.

Petitioners assert that the City and the council member-plaintiffs will be injured because the City's tax base may be decreased and that both the City and individual councilmembers will be injured by suits arising from their enforcement of the allegedly unconstitutional provisions of the CTRPA plans and ordinances. Neither of these theories serves for either the City or the councilmembers.

With regard to the City, as the Ninth Circuit recognized below:

> "It is well established that '[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment.' " [Citations omitted.] 625 F.2d at 233.

As this Court noted over 70 years ago, since the State creates municipal corporations as convenient agencies for exercising "such of the governmental powers of the State as may be entrusted to them," the state is entirely free to alter their powers in any manner, to take any of their property without paying any compensation whatsoever, and may even destroy the municipality totally without any restraint imposed by the U.S. Constitution:

> "In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of

> the increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it." *Hunter* v. *Pittsburgh,* 207 U.S. 161, 178–179 (1907).

The City attempts to distinguish this case and the numerous others to the same effect cited below by the Ninth Circuit on the ground that this is a suit against a political subdivision alleging that the ordinances of the political subdivision are invalid. (The City admits that the statutes authorizing the adoption of those ordinances are valid.) However, this argument is supported by no authority of which we are aware, and none is cited by the City. Petn. for Writ of Cert., p. 13; see *New Orleans* v. *New Orleans Water Works Co.,* 142 U.S. 79 (1891). The purported distinction in fact only points out the bizarre nature of this case: it is a suit filed by one political subdivision of the State of California against another political subdivision of the State of California alleging the invalidity of ordinances admittedly enacted under a valid delegation of authority by the state to the defendant political subdivision. A finding that standing exists here would certainly require a broader concept of federal jurisdiction and standing than has previously been thought proper by this Court.

Petitioners' assertion that they should be granted standing based on the potential liability of the individual

councilmembers for enforcing or failing to enforce the provisions of the CTRPA plans and ordinances is equally flawed. The argument they make is that state law requires them to enforce CTRPA plans and ordinances, yet if they do so they will be violating their oaths to support and defend the U.S. Constitution and will be subjected to civil and criminal liability for their actions.

Numerous cases decided by this Court have stated that a public official interested only in doing his official duty may not challenge the constitutionality of a statute. See e.g., *Ashwander* v. *Valley Authority,* 297 U.S. 288, 346–348 (1936); *Smith* v. *Indiana,* 191 U.S. 138, 149 (1903).

In the past few years, several federal courts have recognized a narrow class of cases in which local officials were allowed to maintain constitutional causes of action. See *Board of Education* v. *Allen,* 392 U.S. 236, 241, n. 5 (1968); *Akron Board of Ed.* v. *State Board of Ed. of Ohio,* 490 F.2d 1285, 1289–1291 (6th Cir. 1974), *cert. den.,* 417 U.S. 932 (1974); *Aguayo v. Richardson, supra,* 473 F.2d 1090, 1100–1101 (2nd Cir. 1973); *New York.* v. *Richardson, supra,* 473 F.2d 923, 933 (2nd Cir. 1973). All of these cases, however, involved education, religion, or welfare, and in all of them those whose interests were allegedly being violated would have had difficulty in protecting their own interests.

Warth v. *Seldin, supra,* indicates that the general rules pertaining to standing still apply and any exceptions are just that—exceptions.

By contrast, the parties whose real interests underly

this litigation could properly raise the constitutional causes improperly raised by plaintiffs. This Court may take judicial notice for purposes of this argument that these non-parties—taxpayers and property owners within the Lake Tahoe Basin—include among them large, well-financed land developers, speculators, and individual landowners. This Court should not allow public officials to speak for those who are perfectly able to speak for themselves.

Two recent cases have also rejected the notion that *Allen* and its progeny should be construed as overruling the long-standing doctrine that an official's desire to comply with an oath is not sufficient to establish standing in federal court to challenge the constitutionality of statutes. In *Baxley* v. *Rutland,* 409 F.Supp. 1249 (M.D. Ala. 1976) (3 judge court) the court held that the Attorney General of Alabama did not have standing either under a *parens patriae* theory or a "violation of oath" theory to challenge a statute enacted by the Alabama Legislature. The court noted:

> "We emphasize that this case is instituted solely upon the authority of the Attorney General. His mind alone is the directing force. In the unlikely event that he becomes convinced that the Alabama statutes under attack are not violative of the Constitution, or if he should be succeeded by another who so concludes, then certainly at that time this case would lack that 'concrete adverseness which sharpens the presentation of issues upon which the court so depends for illumination of difficult constitutional questions.' *Baker* v. *Carr, supra,* 369 U.S. at 204, 82 S.Ct. at 691, 7 L.Ed.2d at 678, quoted and followed in

Flast v. *Cohen, supra,* 392 U.S. at 99, 88 S.Ct. 1952, 20 L.Ed.2d at 961.

"The subjective opinion of the Attorney General without any other personal stake in the outcome is too weak a base to support the concept of standing and the jurisdictional requirement of a case or controversy between parties with adversary interests. . . ." 409 F.Supp. at 1257.

Similarly, in *Finch* v. *Mississippi State Medical Assn., Inc.,* 585 F.2d 765, 773–775 (5th Cir. 1978) the court rejected the Mississippi governor's claims to standing based on his claims that he was forced to choose between violating his oath and being sued for damages.

Petitioners' claim that they will be subjected to civil liability if they perform their ministerial duty to enforce the CTRPA plans and ordinances is at best speculative. Furthermore, it is simply not consistent with the actual cases which have tested the theory, none of which are mentioned by petitioners.

The plaintiffs in *Western Internat'l Hotels* v. *Tahoe Regional Planning Agency,* 387 F.Supp. 429 (D. Nev. 1975), contended that the actions of the bi-state TRPA had unconstitutionally deprived them of their property and named as defendants the counties in Nevada in which their property was located along with the TRPA. In considering motions to dismiss filed by all of the defendants the court said:

"Boise Cascade and Western Hotels argue that the Counties are liable for the effects of the [Land Use Ordinance] because the Counties have the duty of enforcing the [Land Use Ordinance] and the obligation of funding TRPA. It is also pointed out that the

> Counties appoint one representative to the governing body. The Counties, however, had no part in enacting the Tahoe Regional Planning Compact nor did they legislate the Land Use Ordinance. The duty to enforce and finance TRPA actions was thrust on the Counties by the Compact. While TRPA may be an agent of the States, it is clearly not an agent of the Counties. If a cause of action is made out against TRPA, it will not constitute a cause of action against the Counties. The requests of these plaintiffs for injunctive relief against the enforcement by the Counties of the [Land Use Ordinance] may be considered at such time as [the Land Use Ordinance] is invalidated and the Counties persist in enforcing it. . . ." 387 F.Supp. at 438.

Similarly, in *Jacobson* v. *Tahoe Regional Planning Agcy.,* 566 F.2d 1353 (9th Cir. 1978) rev'd on other grounds, aff'd on other grounds sub nom. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979), the Ninth Circuit was called upon to review the dismissal of a complaint against the TRPA and several counties requesting declaratory, injunctive, and monetary relief for a taking of property by TRPA's Land Use Ordinance. 566 F.2d at 1358. The court affirmed the dismissal:

> "The only possible cause of action against the counties would be one to enjoin their enforcement of the challenged ordinance. As to monetary and declaratory relief, the action against the counties was properly dismissed because the alleged infringement of constitutional rights arises from the action of TRPA. The Compact limits the involvement of the counties to a sharing of the enforcement power with the cit-

ies, the states and the TRPA. Their involvement is purely ministerial, and thus peripheral to the allegations underlying this suit.

"Moreover, there is no evidence that the counties would attempt to enforce the challenged ordinance were the court to declare it unconstitutional. It appears that the counties even look with favor on appellants' development plans.

"We conclude that it was not error to dismiss the suits as against the counties." 566 F.2d at 1361.

The statutory language requiring the City to enforce the CTRPA plans and ordinances is identical to that requiring county enforcement of TRPA plans and ordinances.[6] Indeed, virtually the only difference between the relationships is that the counties are required to financially support TRPA while the City has no such obligation with respect to CTRPA.[7]

The City and its officials are hardly unaware of these cases, as they were cited by the City in a *successful* demurrer to a complaint in a state court brought against both CTRPA and the City by Dillingham Development Company, and *amicus curiae* below in the instant case. (The City's demurrer, its points and authorities in support thereof, and the judgment of dismissal after the sustaining of the demurrer are reproduced in Appendix A, hereto.) The first ground of the City's demurrer was stated as follows:

"Each cause of action alleged fails to state a cause of

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[6] *Compare* Cal. Gov. Code, §§ 67072 and 67102 (West Supp. 1980) *with* Cal. Gov. Code, § 66801, art. VI(b) (West Supp. 1980).

[7] See Cal. Gov. Code, § 66801, art. VIII(a).

> action against defendants City of South Lake Tahoe in that City is not responsible for the actions of CTRPA, nor for the creation of their plans and ordinances, nor for the consequences of those plans and ordinances." Appen. A, p. 2.

We are aware of no actions by private parties in which the City or any of its officials or employees have been found liable to any extent for the actions, ordinances, or plans of CTRPA, or for their own enforcement of the same.[8] Despite petitioners' protestations to the contrary, nothing in the recent decisions of this Court in *Maine v. Thiboutot*, __ U.S. __, 48 U.S.L.W. 4859 (June 25, 1980), or *Owen v. City of Independence*, __ U.S. __, 100 S.Ct. 1398 (1980) creates or recognizes a cause of actions against a local government or its officials based on their actions in performing a purely ministerial duty imposed by state law. These cases both dealt with the liability of the entity or person actually undertaking the allegedly unconstitutional actions, not with the derivative liability of some third party performing only ministerial actions required by state law.

Since the City and its councilmembers have no actual

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[8] The petitioners' argument that the councilmember-plaintiffs face removal from office or criminal prosecution should they fail to enforce CTRPA's plans and ordinances is even further from reality than the "threat" of civil liability. We are aware of no action taken by anyone or even under consideration by anyone which could lead to either of these results. Presumably, were one tried the defendant would have available the argument that he honestly believed that he was following the law rather than violating it. Moreover, as we have noted, the councilmembers can enforce the CTRPA ordinances and plans with no real spectre of civil liability. Thus, a subjective belief in the invalidity of the CTRPA plans and ordinances is really all that exists.

stake in the controversy herein, the Ninth Circuit's ruling was correct and the petition should be denied.

III

THE LIKELIHOOD OF MOOTNESS MAKES A DECISION IN THIS CASE UNNECESSARY

Obviously, due to the pressing workload of truly momentous cases, this Court should not be burdened with deciding cases which are unlikely to have any practical effect. We respectfully submit that this is such a case.

As petitioners briefly note, within the past two months both Nevada and California have approved changes to the compact which created the bi-state TRPA.[9] While the changes have not yet been approved by Congress, there is little reason to believe that such approval will be long in coming.[10] Once approved, the new compact will profoundly affect the claims pressed herein by the City, making many of them utterly meaningless even had the City standing to assert them. For example, one of the chief claims pressed by the City is that the CTRPA plans and ordinances unlawfully conflict with those imposed by TRPA and thus the CTRPA plans and ordinances must fall under the Supremacy Clause. While this claim possessed little chance at the time suit was filed, after the compact has been ratified it will have no validity whatsoever as the compact amendments require TRPA

[9] 1980 Cal.Stats. ch. 872; Nevada Assembly Bill No. 1, Special Session, 1980 Nev. Stats., ch. ___.

[10] A bill approving the new compact was introduced in the U.S. House of Representatives on September 30, 1980, as H.R. 8235.

to enforce the CTRPA plan in the California portion of the Lake Tahoe basin until TRPA has conducted a new study of the environmental problems of the basin and adopted a new plan based on that study.[11] Furthermore, while the City has attacked the subdivision ban imposed by CTRPA until 85% of the lots in the relevant portion of the basin have been used for the construction of a house or commercial structure, the new compact imposes a ban on new subdivisions until TRPA has adopted a new plan or until May 1, 1983, whichever is earlier.[12] Thus, even were a court to find that the subdivision ban imposed by CTRPA to channel development onto already existing lots was illegal, the court would be unable to order approval of new subdivisions without also invalidating the temporary restriction for planning purposes imposed directly by the California and Nevada legislatures with the approval of Congress.

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[11] 1980 Cal. Stats., ch. 872, art. V(e). The CTRPA transportation plan is treated somewhat differently. See *id.*, at art. V(b) and (e).
[12] 1980 Cal. Stats., ch. 872, art. VI.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

DATED: October 22, 1980

Respectfully submitted,

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IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF EL DORADO

NO. 30115

DILLINGHAM DEVELOPMENT COMPANY,

Plaintiff,

v.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; CITY OF SOUTH LAKE TAHOE, et al.,

Defendants.

DEMURRER TO COMPLAINT FOR INVERSE CONDEMNATION, DECLARATORY RELIEF, AND VIOLATION OF CIVIL RIGHTS

Defendant City of South Lake Tahoe demurs to the complaint on file herein on the following grounds:

I.

Each cause of action alleged fails to state a cause of

action against defendant City of South Lake Tahoe in that City is not responsible for the actions of CTRPA, nor for the creation of their plans and ordinances, nor for the consequences of those plans and ordinances.

II.

Plaintiff's Fifth Cause of Action fails to state a cause of action against City in that City is not a "person" within the meaning of 42 USCS § 1983.

III.

There is currently another action pending between the same parties on the same causes of action.

Dated: _____, 1977.

ROY C. ABRAMS
Attorney for Defendant
City of South Lake Tahoe

DECLARATION

I hereby declare that this demurrer is filed in good faith and is not filed for the purpose of delay and that, in my opinion, the grounds are well taken.

Dated: _____, 1977.

(S) ROY C. ABRAMS

The original of this demurrer was mailed for filing on _____, 1977.

Roy C. Abrams, City Attorney
CITY OF SOUTH LAKE TAHOE
Post Office Box 1210
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Attorney for Defendant City of South Lake Tahoe

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF EL DORADO

NO. 30115

DILLINGHAM DEVELOPMENT COMPANY,

Plaintiff,

v.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; CITY OF SOUTH LAKE TAHOE, et al.,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

I.

A CAUSE OF ACTION HAS NOT BEEN ALLEGED AGAINST DEFENDANT CITY OF SOUTH LAKE TAHOE

A. *Code of Civil Procedure § 430.10(f).*

Subsection (f) of Code of Civil Procedure Section 430.10 authorizes a demurrer when:

> (f) The pleading does not state facts sufficient to constitute a cause of action.

B. *Creation of California Tahoe Regional Planning Agency (CTRPA) And Its Mandate Upon The City of South Lake Tahoe.*

In 1967 the Legislature of the State of California created the CTRPA by statute (California Government Code Section 67000 et seq.) The agency was created "as a separate legal entity and as a political subdivision of the State of California" (Section 67040). It was empowered to preserve the natural resources and beauty of the Lake Tahoe region (Sections 67000, 67001) with authority to adopt a regional plan and to enforce it by ordinances, rules, regulations and policies (Sections 67002, 67100).

The City of South Lake Tahoe is a governmental entity within the Lake Tahoe region as defined in the statute (Section 67021). By virtue of that status alone, City is mandated to enforce both the CTRPA regional plan and all of the agency's ordinances, rules, regulations and policies.

> All provisions of the Tahoe regional general plan shall be enforced by the agency and by the counties and the cities in the region. Section 67072.
>
> All ordinances, rules, regulations and policies adopted by the agency (CTRPA) shall be enforced by the agency, and by the counties and cities. Section 67102.

C. *Jacobson v. Tahoe Regional Planning Agency.*

Most recently, in August 1977, the United States Court

of Appeals for the Ninth Circuit, *in Jacobson v. TRPA,* No. 75-2400, faced the question of whether local government was responsible for the actions of TRPA. *Jacobson,* attached hereto for the Court's reference as Exhibit A, was consolidated with three other cases upon appeal. It should be noted at the outset that TRPA is a creation of the States of California and Nevada through a bi-state Compact which was ratified by the United States Congress. The Compact imposes upon local government the same responsibilities of enforcement as does the CTRPA legislation.

The *Jacobson* Court concluded that dismissal of the counties in the Lake Tahoe area was proper (pages 11–12). The counties, joined because of their enforcement authority of the TRPA General Plan, were not responsible for the actions of TRPA. TRPA was found not to be an agent of the counties. (It is interesting to note that in the instant case plaintiff alleges that City is an agent of CTRPA. However, there is no allegation of City action beyond that. *Even assuming, arguendo, that such a relationship exists, there seemingly would be no liability in an agent for a principal's independent actions unrelated to the "agency" relationship. Absent some conduct of the so-called agent, liability is not present.*)

D. *Western International Hotels v. Tahoe Regional Planning Agency (TRPA), Douglas County, Washoe County, et al.*

In *Western International Hotels,* 387 F. Supp. 429 (D. Nev. 1975), defendants Douglas and Washoe Counties moved to dismiss the complaint alleging inverse condemnation and challenging the validity of TRPA's plans

and ordinances. Plaintiffs sought to hold both Douglas and Washoe Counties in the litigation by arguing that the Counties were liable for the consequences of the TRPA plan and ordinances because they had the statutory duty to enforce them and, additionally, because the Counties had the obligation of funding the agency. Moreover, it was argued that each County appointed a representative to the agency's governing body (*Western,* at page 438). *The Court, in granting Counties' motion to dismiss,* stated:

> The *Counties, however, had no part in enacting the Tahoe Regional Planning Compact nor did they legislate the Land Use Ordinance.* The *duty to enforce* and finance TRPA actions *was thrust on the Counties* by the Compact. [Emphasis added] *Western* at page 438.

The Court further emphasized that the complaint did not state a cause of action.

> While TRPA may be an agent of the States, it is clearly not an agent of the Counties. *If a cause of action is made out against TRPA, it will not constitute a cause of action against the Counties. The requests of these plaintiffs for injunctive relief against the enforcement by the Counties of the LUO (Land Use Ordinance) may be considered at such time as LUO is invalidated and the Counties persist in enforcing it.* Such relief is premature at this time. [Emphasis added] *Western* at page 438.

E. *Western As Applied To The Instant Case.*

The complaint herein on file alleges in Paragraph 10 that the "City of South Lake Tahoe has acted as an agent

of, and in agreement with, CTRPA." (It is noted parenthetically that such is not correct as a factual matter. The City has itself filed suit against CTRPA alleging that its ordinances and regulations are unconstitutional; that suit is presently pending in the United States Court of Appeals for the Ninth Circuit.) However, *in any event, the complaint does not allege any actions of the City—as a principal or agent—which will be sufficient to state a claim for relief.*

As in *Western,* supra, the City has not adopted the CTRPA plan or its ordinances, rules, regulations or policies. They have been *thrust upon the City,* as the TRPA ordinances were thrust upon Douglas and Washoe Counties, by virtue of a California state statute. Moreover, and importantly, the City has not sought to enforce such plans and ordinances against plaintiff. The City stands as an unwilling party—both to this lawsuit and to the CTRPA. As such, it can hardly be properly contended that the City is an agent of CTRPA or that, as an agent, it has acted on behalf of CTRPA. *The elements that were present in Western, that caused the Court to dismiss the case against the Counties, are present in the instant case and require dismissal.*

F. *After Western, Layton-Tahoe Properties v. TRPA (1975).*

Subsequent to the decision in *Western,* a similar question of county (local government) liability for TRPA plans and ordinances was raised in *Layton-Tahoe Properties v. TRPA,* Civil No. S-74-547 (E. D. California 1975), attached hereto as Exhibit B. The action brought was one for inverse condemnation. Judge Battin, in de-

ciding to grant the counties motion to dismiss, cited and quoted from *Western.*

G. *Derivative Liability.*

The thrust of plaintiff's complaint is that the City of South Lake Tahoe is liable as an agent of the CTRPA (Complaint, Paragraph 10). Such contentions are those of derivative liability. It thus follows that, to the extent that the CTRPA is not liable, the City of South Lake Tahoe is also not liable.

II.

CITY IS NOT A "PERSON" WITHIN THE MEANING OF THE CIVIL RIGHTS ACT

In the instant case, plaintiff seeks redress for alleged violations of certain specified constitutional rights by invoking this Court's jurisdiction pursuant to the provisions of 42 USCS § 1983. Plaintiff has named the City of South Lake Tahoe, a municipal corporation organized pursuant to the laws of the State of California, in Paragraph 10 of its Complaint, as an agent of CTRPA and has incorporated said paragraph by reference into its Fifth Cause of Action. To the extent that such pleading is an attempt to hold City responsible for violations of 42 USCS § 1983, it must fail.

The law is well settled that a "municipality is not a person" within the provisions of 42 USCS § 1983. In *City of Kenosha v. Bruno,* 412 U.S. 507, 37 L.Ed 2d 109 (1973), an action brought pursuant to 42 USCS § 1983, the Court, in relying upon the doctrine of *Monroe v. Pape,* 365 U.S.

167, 5 L.Ed 2d 492 (1961), stated at page 513:

> In a few cases in which equitable relief has been sought, a municipality has been named, along with city officials, as defendant where violations of 42 USC § 1983 [42 USCS § 1983] were alleged. See, e.g. *Douglas v. City of Jeannette,* 319 US 157 [87 L Ed 1324, 63 S Ct 877]; *Holmes v. City of Atlanta,* 350 US 879 [100 L Ed 776, 76 S Ct 141]. The question dealt with in our opinion was not raised in those cases, either by the parties or by the Court. Since we hold that a municipal corporation is not a "person" within the meaning of § 1983, no inference to the contrary can any longer be drawn from those cases.
>
> *We find nothing in the legislative history discussed in Monroe, or in the language actually used by Congress, to suggest that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them.* Since, as the Court held in *Monroe,* "Congress did not undertake to bring *municipal corporations* within the ambit of" § 1983, id., at 187, 5 L Ed 2d 492, they *are outside of its ambit for purposes of equitable relief as well as for damages. The District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under § 1343.* [Emphasis added]

See *City of Charlotte v. Firefighters,* ___ U.S. ___, 48 L.Ed 2d 636 (1976), wherein *City of Kenosha v. Bruno* was cited with approval. Also see *Fitzpatrick v. Bitzer,* ___ U.S. ___, 49 L.Ed 2d 614 (1976).

In *Moor v. County of Alameda,* 411 U.S. 693, 36 L.Ed 2d 596 (1973), an action in part pursuant to 2 USCS § 1983, the Court again faced the question of whether a

governmental entity was a "person" within the meaning of said statutes. The Court, after considering whether a governmental entity could be held vicariously liable for the actions of its employees by incorporating State law pursuant to 42 USCS § 1983, concluded that the county was not a "person" and that the trial court had properly granted its motion to dismiss.

Consequently, in the instant case there is no claim stated against said City as it is not within the provisions of the statutes relied upon by plaintiff in its Fifth Cause of Action.

III.

PLAINTIFF HAS PENDING A FEDERAL COURT ACTION BETWEEN THE SAME PARTIES ON THE SAME CAUSES OF ACTION

A. *Code of Civil Procedure § 430.10(c).*

Subsection (c) of Code of Civil Procedure Section 430.10 authorizes a demurrer when:

> (c) There is another action pending between the same parties on the same cause of action.

B. *Plaintiff's Federal Litigation.*

On December 17, 1976, plaintiff filed an action for inverse condemnation, declaratory relief and violation of civil rights in the United States District Court for the Northern District of California. The case was then transferred to the Eastern District of California; its number is Civil S-77-285-TJM. (A copy of the Complaint is attached hereto as Exhibit C.)

This state court action seeks identical relief on the same grounds as are set forth in plaintiff's federal action. Abatement of this action is appropriate until a selection of forums is made by Dillingham.

Dated: November 22, 1977.

Respectfully submitted,

Roy C. Abrams, *Attorney for Defendant City of South Lake Tahoe*

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

NO. 272204

DILLINGHAM DEVELOPMENT COMPANY,

Plaintiff,

vs.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, et al.,

Defendants.

JUDGMENT OF DISMISSAL AFTER ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND

WHEREAS, defendant City of South Lake Tahoe's demurrer to Plaintiff's Complaint has been sustained without leave to amend with respect to the First and Second Causes of Action; and

WHEREAS, said Order sustaining the demurrer herein was rendered by the Honorable Fred Marler on August 8, 1979, and entered in Book 474, page 115; and

WHEREAS, notice of the sustaining of said demurrer has been sent to Plaintiff; and

WHEREAS, application has been made for entry of judgment in favor of Defendant City of South Lake

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Tahoe and against Plaintiff Dillingham Development Company; and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED that the First and Second Causes of Action of Plaintiff's Complaint be, and the same are hereby, dismissed as to Defendant City of South Lake Tahoe with prejudice. Plaintiff is to take nothing by this action with respect to said causes of action.

DATED this 26th day of March, 1979.

Judge of the Superior Court

Roy C. Abrams, City Attorney
CITY OF SOUTH LAKE TAHOE
Post Office Box 1210
South Lake Tahoe, CA 95705
(916) 541-2900
Attorney for Defendant City of South Lake Tahoe

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
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NO. 272204

DILLINGHAM DEVELOPMENT COMPANY,

Plaintiff,

v.

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, et al.,

Defendants.

NOTICE OF COURT'S ORDER SUSTAINING CITY OF SOUTH LAKE TAHOE DEMURRER WITHOUT LEAVE TO AMEND

TO: DILLINGHAM DEVELOPMENT COMPANY, ITS ATTORNEYS, FULOP, ROLSTON, BURNS & McKITTRICK; CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, STATE OF CALIFORNIA, OTHER NAMED DEFENDANTS, THEIR ATTOR-

NEY JOEL S. MOSKOWITZ:

YOU ARE HEREBY NOTIFIED that on August 8, 1978, the above-entitled court issued an order sustaining the demurrer of the City of South Lake Tahoe to the First and Second Causes of Action without leave to amend. The order was entered in Book 474, Page 1115. Said order is based on the Court's decision that the First and Second Causes of Action of plaintiff Dillingham's complaint fail to state a cause of action.

A copy of the Court's decision is attached hereto.

Dated: August 15, 1978.

Roy C. Abrams, *Attorney for City of South Lake Tahoe*